Office-Supreme Court, U.S.
FILED
MAY 26 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

HERBERT SCNHEIDER,)
Appellant,) No. [redacted]196
v.)
WILLARD J. SMITH, Commandant,)
UNITED STATES COAST GUARD,)
Respondent.)

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Northern Division, entered on January 23, 1967, dismissing appellant's complaint with prejudice. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the district court is reported in 263 Fed. Supp. 496. It is set forth in the Appendix beginning at page 1a.

JURISDICTION

Appellant's complaint in the district court sought an injunction against the enforcement of the Magnuson Act, 50 U.S.C. § 191, which was being applied by Coast Guard regulations to keep appellant, a seaman, from sailing on United States merchant vessels of over 100 tons unless he would submit to a political interrogation. Jurisdiction of the district court was based upon 28 U.S.C. § 2282. Appellant applied for injunctive relief and a three-judge district court was convened pursuant to 28 U.S.C. § 2284. Jurisdiction in the district court also rested upon 28 U.S.C. § 2201 because appellant asked for a judgment declaring unconstitutional 50 U.S.C. § 191 and regulations issued thereunder and upon 28 U.S.C. § 1331, because the complaint alleged that respondent's actions had damaged appellant in excess of $10,000,[1/] and arose under the Constitution and laws of the United States.

The district court filed an opinion on January 23, 1967, which concluded with an order dismissing the complaint with prejudice ((R 254-2 55; Appendix p. 9a)). Notice of appeal from this order was filed in the United States District Court for the Western District of Washington on March 17, 1967. ((R 261.))

Jurisdiction of this court is invoked under 28 U.S.C. § 1253 to review the judgment of the three-judge district court denying relief. The following case sustains the jurisdiction of the Supreme Court on direct appeal: Aptheker v. Secretary of State, 378 U.S. 500.

1/ The pre-trial order in this case provided that "pursuant to stipulation of the parties the damage question is reserved until after determination of the constitutional questions of law by the three judge court and may be heard by a single judge." ((63)).

STATUTES INVOLVED

The statute here involved, the Magnuson Act, 50 U.S.C. § 191, reads as follows:

> "Regulation of anchorage and movement of vessels during national emergency.
>
> "Whenver the President by proclamation or executive order declares a national emergency to exist by reason of actual threat and war, insurrection, or invasion, or disturbance or threat in disturbance of international relations of the United States, the Secretary of Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel foreign or domestic, in the territorial waters of the United States; may inspect such vessels at any time, place guards thereon, and if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure observance of the rights andobligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.
>
> "Within the territory and waters of the Canal Zone the Governor of the Canal Zone, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.
>
> "Whenever the President finds that the security of the United States is in danger by reason of actual threat and war, or invasion, or insurrection, or subversive activity, or of disturbances or threat and disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations --
>
> "(a) To govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United

States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

"(b) To safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States. Any appropriation available to any of the Executive Departments shall be available to carry out the provisions of this chapter. June 15, 1917 c. 30 title II, Sec. 1, 40 Stat. 220; Aug. 9, 1950, c. 656, Sec. 1, 64 Stat. 427; Sept. 26, 1950, c. 1049, Sec. 2(b), 64 Stat. 1038."

QUESTIONS PRESENTED

I

Under the Magnuson Act as applied in this case through Coast Guard regulations virtually all seamen and other maritime workers, in order to work aboard ships and waterfront facilities, must be in possession of specially validated documents issued by the Coast Guard. Applying the act and regulations to appellant, the Coast Guard has refused to specially validate his documents, or to consider his application for such validation until he answers interrogatories under oath about his present or past membership in, or relationship to, organizations on the Attorney General's list, his activities on behalf of a newspaper called the "People's World", and his present attitude toward Communism and toward the form of government of the United States.

(1) As so applied, is the Magnuson Act: A bill of

attainder and ex post facto law prohibited by Article I, Section 9 of the Constitution?

(2) As so applied, is the Magnuson Act a constitutionally prohibited abridgment of freedom of speech, of the press, and of assembly?

(3) As so applied, does the Magnuson Act deny appellant due process because, under its authority the Coast Guard has prevented him from pursuing his calling as a ship's engineer --

(a) Applying standards so vague as to be incapable of ascertainment or understanding;

(b) Acting under regulations that make the arbitrary assumption that there is a correlation between the political associations or beliefs of an individual and the likelihood that he will engage in acts of sabotage;

(c) By requiring him to waive constitutionally protected rights to obtain consideration of his application;

(d) By creating and applying an irrebutable presumption that, in the absence of any derogatory information about appellant, his refusal to answer questions about his past political associations or his present political attitudes indicates that he is a security risk;

(e) By compelling him to seek special validation in an administrative proceeding that does not afford a fair hearing, review, or appeal.

II

Does the Magnuson Act authorize the maritime industry screening program applied in this case?

STATEMENT

Appellant is a qualified and licenses marine engineer who sailed on United States merchant vessels as a merchant seaman in various capacities between 1942 and 1949. Since 1949 he has engaged in non-maritime employment. [R 56]. In October 1964 he applied to the United States Coast Guard office in Seattle for renewal and validation of his merchant mariner's documents first issued to him in 1940. [R 56]. The Coast Guard refused to process his application or to issue the special validation of his merchant mariner's document required for his employment as a merchant seaman until he answered under oath questions about his present and past political activities and attitudes. [R 56, 57].

The regulations under which the Coast Guard claimed authority to act provided that "all licensed officers and certificated men who are employed on merchant vessels of the United States" of over 100 gross tons "must be holders of specially validated documents prescribed by the Commandant." (33 C.F.R. § 6.10-3, Appendix, p.12-13a and 33 C.F.R. § 121.01(a), Appendix, p. 16a infra.) Under these regulations "[n]o persons shall be issued [such] document ... unless the Commandant is satisfied that the character and habits of life of such a person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States. ..." (33 C.F.R. § 6.10-1, Appendix, p. 12a, infra.) To the same effect also is 33 C.F.R. § 121.07(a), Appendix, p. 21a, infra.

The standards set by the regulations "which may preclude a determination that" the applicant has the requisite character "relate" among other things to "[m]embership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended." (33 C.F.R. § 121.03, Appendix, p.19a infra.) [R 57, 66-68, 80-83]. Thus, such membership, affiliation, or association (whether past or present) may without more bar a maritime worker from private employment.

Appellant was required as part of his application to answer under oath the question: "Are you now, or have you ever been, a member of, or affiliated or associated with in any way any of the ..." approximately 300 organizations named by the Attorney General as "subversive". [R 80]. He answered "Yes", [R 80], and added in explanation: "I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge I have not been a member or participated in the activities of any of these organizations for ten years." [R 82].

The Coast Guard took no action of any kind on appellant's application until his attorney demanded an explanation for the delay and at the same time protested the use of the Attorney General's list as "an unreasonable criteria as a precondition of employment", violative of "constitutional standards". [R 64, 65]. A reply from the Coast Guard excused the delay on the grounds of appellant's "reluctance to furnish names and dates of his member-

[illegible] which have been designated

The standards set by the regulations "which may preclude a determination that" the applicant has the requisite character "relate" among other things to "[m]embership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended." (33 C.F.R. § 121.03, Appendix, p.19a infra.) [R 37, 66-68, 80-83]. Thus, such membership, affiliation, or association (whether past or present) may without more bar a maritime worker from private employment.

Appellant was required as part of his application to answer under oath the question: "Are you now, or have you ever been, a member of, or affiliated or associated with in any way any of the ..." approximately 300 organizations named by the Attorney General as "subversive". [R 80]. He answered "Yes", [R 80], and added in explanation: "I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge I have not been a member or participated in the activities of any of these organizations for ten years." [R 82].

The Coast Guard took no action of any kind on appellant's application until his attorney demanded an explanation for the delay and at the same time protested the use of the Attorney General's list as "an unreasonable criteria as a precondition of employment", violative of "constitutional standards". [R 64, 65]. A reply from the Coast Guard excused the delay on the grounds of appellant's "reluctante to furnish names and dates of his membership in several of the organizations which have been designated

by the Attorney General. ...", but "anticipated that action will be taken in the near future". [R 66]. Appellant's counsel again protested the use of the Attorney General's list as a part of the screening process and urged a speedy decision on the application. [R 67, 68]. The Coast Guard then sent a set of interrogatories to be answered under oath by appellant. These interrogatories, referring to his earlier statement that he had "been a member of many ... organizations, including several named on" the Attorney General's list, asked appellant to:

> "(a) List the names of the political and social organizations to which you have belonged, and location.
>
> "(b) Furnish approximate dates of membership.
>
> "(c) Furnish full particulars concerning the extent of your activities and participation in the organization (number and type of meetings; functions attended; positions or offices held; classes or schools attended; contributions made; etc.)
>
> "(d) Your reason for discontinuing the membership.
>
> "(e) Your present attitude toward the principles and objectives of the organizations." [R84]

The interrogatories also requested answers and a full explanation concerning the following:

> "Are you now or have you evern been a member of or affiliated with, in any way, the Communist Party, its subdivisions, subsidiaries or affiliates?
>
> "Have you at any time been a subscriber to the 'People's World'?
>
> "Have you at any time engaged in any activities in behalf of 'People's World'?
>
> "What is your present attitude toward the Communest Party?

"What is your present attitude toward the principles and objectives of Communism?

"What is your attitude toward the form of Government in the United States?" [R 85]

The interrogatories were accompanied by a form of oath which includes a warning that "any false statement may be punishable under § 1001, Title 18, United States Code." [R 84-86]. (18 U.S.C. § 1001 creates a felony, punishable by up to five years' imprisonment and $10,000 fine.)

Appellant, through his attorney, refused to answer these interrogatories, stating that it is "because of Mr. Schneider's commitment to the Constitution of this country and the Bill of Rights that he finds the questions so obnoxious" and that it is not he "who is subversive ..., but rather ... those who would insist that a matter of what a person reads or thinks is relevant to their dedication to the freedom principles for which this country stands". [R 71-73].

The Commandant of the Coast Guard, relying on the provision of 33 C.F.R. § 121.05(c)(2) that "[i]f an applicant fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquiries directed to him", advised that no further action would be taken on appellant's application. [R 70].

Appellant thereupon filed his complaint, petitioning for declaratory relief, for an injunction against enforcement of the Act in such a way that it would be impossible for him to pursue his calling as a seaman, and for damages.[2] [R 17]. Upon application, a three-judge court was designated, which heard the case on the pre-trial order filed September 30, 1966. [R]. The pre-trial order provided:

> "The defendant does not intend to contest the following facts at the trial by evidence to the contrary ... Plaintiff is now and always has been loyal to the United States of America ... Plaintiff has never committed any act of sabotage or espionage or any act inimical to the security of the United States of America."

The court filed its opinion, ordering dismissal of the complaint with prejudice on January 23, 1967. It is from this order of dismissal that the present appeal was taken on March 17, 1967.

THE QUESTIONS PRESENTED ON APPEAL ARE SUBSTANTIAL.

A. The questions presented potentially affect the employees of every industrial establishment in the United States.

The ruling of the court below authorizes a governmental agency to conduct a sweeping inquiry into the past and present political associations and beliefs of more than 130,000[3] maritime

---

2/ See footnote 1, page 2, supra.

3/ In calendar-year 1965 50,894 seamen were employed on United States-flag vessels of 1000 gross tons and over, exclusive of vessels on inland waterways, the Great Lakes, and exclusive of United States government-owned vessels. Table 887, p. 607, "Statistical Abstract of the United States 1966" (Department of Commerce, Bureau of the Census). Employment figures for the category of United States-flag vessels between 100 gross tons (theminimum gross tonnage covered by the Magnuson Act and the regulations) and 1000 gross tons are not readily available from official publications, but the number of such vessels is in excess of 11,000. Table 895, p. 611, "Statistical Abstract of the United States, 1966". (continued on p. 11)

and dockside workers. These employees of private employers [4] are required as a condition of their initial or continued employment to answer questions under penalty of perjury [5] covering a broad range of political affiliations and a wide spectrum of political attitudes and beliefs, such as the questions put to appellant and described above, pp.

If the protection of merchant ships and port facilities justifies screening employees by means of a test of their political beliefs because "there is a vital governmental interest at stake in preventing loss and injury to vessels, ports, and harbors of the Merchant Marine through sabotage and other subversive acts", [6] then the same reasoning would justify extension of such screening to all the transportation industries, to every industrial facility, should Congress so decide, and indeed even to those using streets and highways where goods needed in defense plants may pass to become targets of sabotage. Thus, the implications of the decision below vitally

---

As of early 1966, the Coast Guard was receiving some 2300 requests each month for original documents for seamen; testimony of Capt. Lynn Parker, U.S.C.G., Chief of the Merchant Vessel & Personnel Division of the Coast Guard, at p. 9, "Maritime Manpower Shortage", Doc. H.R. 89-30. At this rate, the Magnuson Act and the Coast Guard regulations are applied to some 28,600 more maritime workers each year.

In addition, the Coast Guard applies virtually identical screening procedures (33 C.F.R. 125.01 et seq.) to laborers in the longshoring labor pool, which included about 88,000 men in 1965. See 1965 annual report of the U.S. Maritime Commission at p. 39.

The screening procedures have thus probably been applied to over a quarter-million workers in the 16 years of the Act's existence.

4/ "Of the Federal Government Security programs only one involves persons who are not seeking some action or advantage from the government. That program is the one governing the security of vessels and waterfront facilities. ..." Communist Security & Loyalty, 51.1.

5/ 18 U.S.C. § 1001, [R 8-36]. See Note 1/ supra, p. 2.

6/ Opinion of the Court below, Appendix, pp. 7-8, infra.

affect every citizen in the United States whose occupation or activities take him to any facility which the Congress or the State Legislatures (Cf. Lerner v. Casey, 357 U.S. 468) may deem vital to the "national defense". Appellant has refused to acknowledge that government has, constitutionally, so broad a right to inquire into the past or present political attitudes of private citizens as a condition to their employment in a lawful private occupation. His constitutional claim deserves examination by this court.

B. The constitutional questions are substantial.

1. Abridgement of freedom of speech, press, assembly, and association.

The operation of this broad-scale screening program must inevitably have a "chilling effect" upon the exercise of First Amendment rights by maritime and dockside workers. (Cf. Dombrowski v. Pfister, 380 U.S. 749. Many seamen and longshoremen desirous of continuing their employment, would "steer far wider of the unlawful zone ..." Speiser v. Randall, 357 U.S. 513, 526, and thus would seek to avoid any political opinion or association with any group or reading of any newspaper which might dissatisfy the particular Commandant of the Coast Guard administering the program. The substantiality of this threat to First Amendment freedoms, which "need breathing space to survive", NAACP v. Button, 371 U.S. 415, 438, is not diminished because appellant is a seaman rather than a teacher.

The court has suggested that teachers have a right to freedom of inquiry that may not be abridged by test oaths and by

official sanctions imposed upon membership in political organizations. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966). We recognize the importance of freedom in academic life, but we suggest that the principles of Keyishian and Elfbrandt are and ought to be no less applicable to persons in other endeavors. First Amendment rights are personal, not occupational. The rights of seamen and longshoremen to exercise of First Amendment freedoms were at issue in DeJonge v. Oregon, 299 U.S. 353 (1937), where the Court struck down criminal punishment for peaceful and lawful political activities. In Baggett v. Bullitt, 377 U.S. 300 (1964), although teachers were included among the plaintiffs, the vague and threatening attack on free speech there struck down applied to all State employees. In Dombrowski v. Pfister, 380 U.S. 479 (1965), this court granted injunctive relief against abridgement of the First Amendment rights of two lawyers and the executive director of a civil-rights group.

Workers in the maritime and stevedoring industries have historically been in the forefront of organized labor and social reform. The industries have produced such well-known intellectuals as the novelists Joseph Conrad and Jack London and the philosopher Eric Hoffer. Intellectual life and social controversy are no strangers to the maritime industries.

The exercise of First Amendment freedoms is doubly threatened in Coast Guard "screening" programs: First, merely as a condition of participating in the administrative procedures of

the Coast Guard one is required to submit answers under oath, to extensive questions about exercise of protected rights. Second, evidence of the exercise of those rights may be sufficient to bar one from employment; the Coast Guard is authorized by 33 C.F.R. § 121.03(a), Appendix, p. 19a, to do what Arizona was prevented from doing in Elfbrandt v. Russell, 384 U.S. 11 - bar one from employment by "guiltless knowing behavior". (Cf. Aptheker v. Secretary of State, 378 U.S. 500.)

2. Due process.

The due process questions in this case are complementary to those presented in McBride v. Roland, 369 F.2d 65, (2d Cir. 1966), petition for certiorari, sub. nom. McBride v. Smith, No. 1105, filed March 1, 1967. In that case the applicant was disqualified after a hearing. The basis of that action by the Commandant was McBride's past membership in the Communist party and the claim that some of his answers on the original application were false. In this case appellant's disqualification is made without any hearing and results from his refusal to submit to what he viewed as an unconstitutional procedure.

First, the standards upon which his application was to be judged involved such vague and undefined terms as "inimical to security", "sympathetic association", and "sufficient information ... to satisfy [the Commandant] ..." as to "the character and habits of life" of the applicant. The special interrogatories put to appellant [R84-85] are even vaguer. The answers to these inquiries may be taken by the Coast Guard as sufficient to bar appellant from his vocation, and they are to be completed under the threat

of perjury. What standards will be applied to answers to such questions as, "What is your attitude toward the form of government in the United States?"? In preparing his application, or answering such interrogatories appellant is entitled to know with more precision than this what he is being asked to respond to and what are the relevant standards. (Cf. O'Connor v. U.S., 99 App. D.C. 373, 240 F.2d 404 (1956); U.S. v. Lattimore, 94 App. D.C. 268, 215 F.2d 847 (1954); Watkins v. U.S., 354 U.S. 178 (1957).

Second, appellant has had no hearing upon his application for the necessary Coast Guard validation because he has refused to permit the intrustion of a governmental official into his affairs to determine whether his political beliefs, attitudes and associations are sufficiently orthodox to justify his further employment as a seaman. His refusal to answer the special interrogatories has resulted in the application of the sanction of Section 121.05(d)(1) and (2). (Appendix, pp. 20a-21a). His application has in effect been rejected by the Commandant, who has held it "in abeyance ... until the applicant furnishes" the desired information under oath and under penalty of perjury. Applicant's refusal to permit disclosure of his political beliefs is constitutionally protected by that "constitutional doctrine which ... emerged since" Adler v. Board of Education, 342 U.S. 485. This doctrine rejected the "premise ... that public employment ... may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action", Kevishian v. Board of Regents of N.Y., 385 U.S. at 605. The Commandant conditions further consideration of appellant's application (and

thus, his right to employment, upon his surrender of his constitutional right to immunity from inquisitorial governmental intrusion into his private beliefs, and convictions and an inquiry into the details of his past political associations.

This case, then, raises the substantial constitutional question whether the doctrines of Keyishian v. Board of Regents, and the cases upon which it rests apply to governmental acts that condition private employment upon surrender of constitutional rights.

Third, the basic twin concepts upon which the screening program rests, that there is some direct and inevitable correlation between political association and beliefs and a proclivity for sabotage, and that one who refuses to permit an inquiry into his political beliefs and associations is a danger to security, have been undermined in the recent decisions of this court in Baggett v. Bullitt, 377 U.S. 360, and Elfbrandt v. Russell, 384 U.S. 11, Cf. Aptheker v. Secretary of State, 378 U.S. 500. As was said in Bailey v. Alabama, 219 U.S. 219 at 239 (1911) (quoted with approval in Speiser v. Randall, 357 U.S. 513 at 526 (1958)),

> "The power to create presumptions is not a means of escape from constitutional restrictions."

Fourth, the Coast Guard's regulations put the burden of proof, i.e., the burden of persuasion, upon the appellant. He must satisfy the Commandant that he is not dangerous, 33 C.F.R. § 121.07, Appendix, p. 20a. If his application is rejected, he must then also bear the burden of production of evidence. The teaching of Speiser is that the shifting of the burdens in this way is impermissible where the applicant is being required to

justify his exercise of First Amendment rights.

Fifth, a substantial constitutional issue is presented as to whether the Coast Guard regulations afford a fair hearing or a fair review. The hearing boards are authorized by 33 C.F.R. § 121.19(f), (Appendix, pp. 26a-27a), to take into consideration "undisclosed information" from "confidential sources" without requiring supporting witnesses to appear before the board for cross-examination. These failures to insure the applicant's right to a confrontation of witnesses and to a full understanding of the charges against him were involved in Parker v. Lester, 227 F.2d 708 (Cir. 9, 1955), where the then-existent screening program was stricken down. Subsequent to that decision, the board was enjoined that "[e]very effort should be made to produce material witnesses".(33 C.F.R. § 121.19(f)) and that if "the applicant ... is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration." 33 C.F.R. § 121.19(h), (Appendix, p. 27a).

These changes do not correct the constitutional infirmities noted in Parker v. Lester. Cf. Greene v. McElroy, 360 U.S. 474. Taken together, the regulations fail to afford procedural due process; applicants can have no assurance that they will receive fair initial hearings or reviews based upon records fairly made.

3. Bill of Attainder.

The screening program as applied in this case rests in part upon the use of the Attorney General's list of subversive organizations as a means of determining whether a seaman or ship's

officer shall be qualified for employment. The "standards" set forth in 33 C.F.R. § 121.03 (Appendix, p.19a) specifically provide that a factor which "may preclude" qualification of a seaman is "membership in or affiliation or sympathetic association with" an organization on the Attorney General's list. The regulations thus give the Commandant the right to exclude an applicant solely on the basis of membership in, or affiliation or association with, an organization on the list. This procedure, if authorized by Congress, as the lower court held it had been, bears the earmarks of a bill of attainder.

In Lovett v. U.S., 328 U.S. 303, the court held that legislative exclusion of named people from public employment violated the prohibition against bills of attainder. In Cummings v. Missouri, 4 Wall. (U.S.) 356, 18 L.Ed. 356, and in Ex parte Garland, 4 Wall. (US.) 333, 18 L.Ed. 366, it was held that legislative exclusions of classes of persons from private employment (Cummings had been barred from acting as a priest and Garland sought readmission to the bar of the U.S. Supreme Court) were in each instance bills of attainder. It was intimated by Mr. Justice Black in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 at 143-44, that the proscription of named organizations by executive action has the characteristics of a bill of attainder. In Brown v. U.S., 381 U.S. 437, the court struck down as a bill of attainder an act making it unlawful for one to serve as an employee or officer of a labor union if one was a member of a legislatively named organization.

Thus, the prohibition against bills of attainder forbids the legislature to bar one from public or private employment

by reason of membership in a proscribed organization. If the Legislature were to name 250 organizations, rather than one, the act would nonetheless be a bill of attainder.

Here, the executive, claiming to act under Congressional authority, the Magnuson Act, asserts the right to exclude persons from private employment because of membership in (or affiliation or association with) any of a large number of organizations that have been named by the executive, also under asserted Congressional authority. If Congress had in terms named all the organizations on the Attorney General's list and then barred past or present members thereof from private maritime employment, such an enactment would have been a bill of attainder. Brown v. U.S., supra. May the Congress delegate to the executive a power that the Constitution forbids the Congress itself to exercise? As was said in Brown v. U.S.,

> "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics." (381 U.S. at 455)

The Commandant has attempted precisely to use membership in the organizations on the list as such an equivalent expression.

C. The question of whether the Magnuson Act Authorizes the screening procedures here involved should be determined by this Court.

The stated purpose of the Magnuson Act is to safeguard shipping and port facilities against physical destruction, loss, or injury "from sabotage or other subversive acts, accidents, or other causes of similar nature." The Act authorizes

"rules and regulations governing the anchorage and movement of any vessel" inspection of "such vessels at any time" and removal from such vessels of "all persons not specially authorized ... to go or remain on board." The clear implication is that the President is so authorized only pursuant to taking "full possession and control" of a vessel. There is no suggestion in the wording of the Act that its framers intended to authorize the type of sweeping political inquiries that have been directed to the appellant in this case or to seamen, longshoremen, and stevedores generally. Since the Coast Guard screening program clearly impinges upon rights protected by the First Amendment, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms" is required, (NAACP v. Button, 371 U.S. 415, 438.) Thus, if Congress had intended to establish a legislative equivalence between certain political beliefs or activities and a disposition to cause physical harm to shipping facilities, it must be presumed that the legislation would have been drawn with precision to define and limit such intended equivalence with sharp and clear definitions. The court has previously held that it will not assume that security clearance programs that fail to afford full due process have been authorized.

> "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." Greene v. McElroy, 360 U.S. 474 at 507.

See also Peters v. Hobby, 349 U.S. 331, and Cf. Kent v. Dulles, 357 U.S. 116.

In view of the substantiality of the questions presented, the court should note probable jurisdictions.

JOHN CAUGHLAN
615 Arctic Building
Seattle, Washington 98104

For Counsel for Appellant

JOHN CAUGHLAN
LEONARD W. SCHROETER
CHAS. H. W. TALBOT
MICHAEL H. ROSEN

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

APPENDIX

OPINION OF COURT BELOW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HERBERT SCHNEIDER, Plaintiff, vs. E. J. ROLAND, Commandant, United States Coast Guard, Defendant.	NO. 6553 OPINION

Before: JERTBERG, Circuit Judge, and LINDBERG and BEEKS, District Judges.

BEEKS, District Judge:

This case presents once more the perennial but difficult problem of striking a balance between the protection of individual liberties and the security of the United States.

Plaintiff, who holds a valid license to serve as a second assistant engineer on steam vessels, applied to the Coast Guard in Seattle in October of 1964 for the validation of his mariner's certificate. This validation by law is a prerequisite to his employment aboard a ship of more than 100 gross tons in the U.S. Merchant Marine. As part of that application, he completed a

questionnaire relating to his loyalty to the government of the United States.[1] In March of 1965, the Coast Guard informed plaintiff that his questionnaire "does not contain, in the judgment of the Commandant, sufficient information for a determination with respect to your eligibility," and sent him a set of interrogatoreis to answer in writing and under oath.[2] Plaintiff was informed that, "No further action will be taken on your application until your reply is received at this Headquarters."

Plaintiff, through his counsel, replied that requiring him to answer the interrogatories violated his constitutional rights, inasmuch as, "it can be none of the government's business what he reads or what he thinks." He refused to answer the interrogatories, and demanded that his certification be granted.[3] The Coast Guard, pursuant to its regulations, has held plaintiff's application in abeyance ever since, refusing either to deny it or to grant it until such time as plaintiff answers the interrogatories. Plaintiff filed this action, requesting a declaration of the unconstitutionality of the legislation, executive orders, and regulations governing the Coast Guard's procedures in this case; a mandatory injunction requiring defendant to approve his application and to refrain from interfering with his employment aboard United States flag vessels; and damages in excess of $10,000.[4] Jurisdiction is vested in this court by virtue of the challenge to Congressional legislation and the request for an injunction against its enforcement.

The Magnuson Act, 40 Stat. 220 (1917), as amended by 64 Stat. 427 (1950), 50 U.S.C. § 191 (1952), provides in

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

relevant part:

> "Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of distrubances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations -
> * * *
> "(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

On October 18, 1950, pursuant to the authority granted him by the Magnuson Act, the President issued Executive Order No. 10173. As amended by Executive Orders No. 10277 and 10352, subpart 6.10-1 of that order provides:

> §6.10-1. Issuance of documents and employment of persons aboard vessels. No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: Provided, that the Commandant may designate categories of merchant vessels to which the foregoing shall not apply. (Exec. Order No. 10352, 17 Fed. Reg. 4607 (1952)).

Regulations promulgated by the Coast Guard pursuant to this Executive Order and published in 33 C.F.R. § 121 establish the machinery of the screening program. Included among those regulations are the following:

> §121.03 Standards.
>
> Information concerning an applicant for special validation endorsement for emergency service, or a holder of such endorsement, which may preclude a determination that his character and habits of life

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, shall relate to the following: * * *

(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

§ 121.05 Applications.

* * *

(d) (1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisfy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in §121.03 and necessary to enable him to make such a determination.

(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

Other provisions in the regulations require that when the Commandant denies an application for a special validation certificate, he must give written notice to the applicant along with a statement of the reasons for his so doing. In addition, the regulations provide for a hearing on the Commandant's ruling, and for appeal.

Plaintiff takes the position that in passing the Magnuson Act, Congress did not intend to authorize the creation of a personnel screening program. With this we cannot agree. The Magnuson Act grants to the executive branch the authority to make rules and regulations for the explicit purpose of safeguarding against sabotage and other subversive acts. An

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

appropriate if not essential component of a code of rules and regulations designed to achieve that objective is an effort to insure that those persons sailing aborad vessels in the merchant marine are not politically notivated to commit acts of sabotage and destruction. Cases arising under the Magnuson Act have consistently so held: Parker v. Lester, 227 F 2d 708 (9th Cir. 1955); United States v. Gray, 207 F 2d 237 (9th Cir. 1953); McBride v. Roland, No. 30331, 2d Cir., Nov. 23, 1966. Counsel contends that merchant seamen spend their professional lives at sea, many of them, such as plaintiff, in the bowels of commercial vessels, having no access to classified information and therefore constituting no threat to national security. We find this a flagrant non sequitur, for it is hard to imagine a more strategic location for purposes of sabotage of vessels, harbors, ports, and waterfront facilities than in the bowels of deep-draft vessels.[5]

We turn, then, to the contention that requiring plaintiff to supply the information demanded infringes upon his constitutional freedoms of speech, belief, and association, and upon his right to enjoy the benefits of freedom of the press. In Konigsberg v. State Bar of California, 366 U.S. 36 (1961), the United States Supreme Court upheld the rejection of an application for admission to the state bar where the applicant had refused to answer questions pertaining to his membership and participation in the Communist Party. In rejecting the same contention as is made in this case, the Court stated:

> ". . . general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. [citations omitted] It is in the latter class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. [citation omitted]. Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved. [citations omitted] (366 U.S. at 50-1)."

In American Communications Association v. Douds, 339 U.S. 382 (1950), the Supreme Court upheld a requirement that each officer of a labor union utilizing the opportunities afforded by the Management Labor Relations Act must file an affidavit that he is not a member of the Communist Party and does not subscribe to certain of its principles. In response to the challenge that this requirement was an unconstitutional abridgment of free speech, the Supreme Court held:

"When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." (339 U.S. at 399).

The Court concluded:

"We must, therefore, undertake the 'delicate and difficult task. . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.'" [citation omitted]. (339 U.S. at 400).

There can be little question that there is a vital governmental interest at stake in preventing loss and injury to vessels, ports, harbors, and waterfront facilities of the

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

merchant marine through sabotage and other subversive acts. The merchant marine, sometimes termed this nation's "fourth arm of defense," shoulders much of the burden of logistical support for the armed forces. The vital governmental interest to be served by a program which screens its personnel is clear. But plaintiff charges that the information which the Commandant seeks to elicit from him is not relevant to the protection of that interest, and that therefore the abridgment of free speech and association which the questions entail is not within the protection afforded by the program's lawful purpose.

The bulk of the information required by the Commandant, and which plaintiff refused to supply, relates to his membership and activities in the Communist Party and other organizations dedicated to the overthrow of the Government of the United States by the use of force and violence. The extent to which plaintiff subscribes to those principles, as reflected by his membership and participation in those organizations, must be regarded as a highly relevant line of inquiry in determining whether his presence aboard merchant marine vessels would be inimical to the security of the United States. In McBride v. Roland, supra, a recent decision bearing a close resemblance to the case at bar, the Court of Appeals for the Second Circuit upheld the Commandant's rejection of an application for validation where the information supplied by the applicant indicated he had been an active participating member of the Communist Party. The Court held:

> "The screening program is not unreasonable. The merchant marine, although involving private employment, is vulnerable to sabotage and

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

> espionage, and is obviously a sensitive area of employment of vital importance to the national defense.... In the case before us we have at issue the reasonableness of regulation of employment in a peculiarly sensitive area of those who are knowing members and the nature of whose membership activities makes it likely that their presence would be inimical to the United States. As interpreted and applied to the facts here we find nothing unreasonable in the regulations."

Plaintiff requests that this Court order the Commandant to make a final disposition of his application for a special validation, either denying it or granting it. Holding the application in abeyance, plaintiff contends, has the evils of a formal denial without its concomitant virtues. It deprives him of the right to earn his living as a merchant seaman; and yet denies him the hearing and appeal to which he would be entitled were his application formally denied. Plaintiff recognizes that the Coast Guard regulations (33 C.F.R. §121.05 (d)(2), supra) specifically authorize the Commandant to hold his application in abeyance, but contends that the regulation is not authorized by Congress and is an unconstitutional denial of procedural due process.

In support of this contention, plaintiff cites Graham v. Richmond, 272 F 2d 517 (D.C. Cir. 1959), where a divided court held that in the absence of express regulatory authority the Commandant of the Coast Guard could not refuse further consideration to the application for validation of a seaman who refused to answer certain interrogatories similar to those in this case. But the Graham decision antedated (and perhaps gave rise to) the promulgation of the regulation which governs this case. The absence of regulatory authority found the basis for the decision in Graham; and its presence in this case must similarly be determinative.

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

Moreover, we cannot agree that the regulation, as applied to plaintiff, is unreasonable. The interrogatories which he refused to answer sought information so relevant to the purposes of the screening program that plaintiff was not privileged to refuse to answer. Where he nevertheless refuses to do so, we do not feel that due process entitles him to the formal denial and to the hearing and appeal which could follow. We make no finding, however, as to whether plaintiff is or is not qualified for validation as a mariner. We are unable to do so for the same reason that the Commandant has not: plaintiff has refused to provide the raw materials for such a decision. He is not entitled to definitive action on his application until he does so.

Other contentions raised plaintiff, including the allegation that the Commandant's interrogatories were unconstitutionally vague, are without substantial merit, and are not worthy of extended discussion.

Complaint dismissed with prejudice.

Dated this 23rd day of January, 1967.

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ WILLIAM J. LINDBERG
United States District Judge

/s/ WILLIAM T. BEEKS
United States District Judge

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

FOOTNOTES

1/ The relevant questions thereon and plaintiff's answers are:

Q. "Item 6. Are you now, or have you ever been, a member of, or affiliated or associated with in any way, any of the organizations set forth below? (Answer 'yes' or 'no'). If your answer is 'yes,' give full details in Item 7."

A. Yes.

[The questionnaire then set forth a list of the names of several hundred organizations. This list, commonly known as the "Attorney General's list," was compiled and issued pursuant to Executive Order No. 10450.]

Q. "Item 7. (Use this space to explain items 1 through 6. Show item numbers to which answers apply. Attach a separate sheet if there is not enough space here.)"

A. "I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge, I have not been a member or participated in the activities of any of these organizations for ten years."

2/ Those interrogatories inquired as to plaintiff's membership and participation in the organizations on the "Attorney General's list"; his present attitudes toward the Communist Party, the principles and objectives of Communism and the form of government in the United States; and whether he at any time had

been a subscriber to a publication known as, "The People's World," or had at any time engaged in any activities in its behalf.

3/ In the same letter, counsel indicated that from approximately 1940 to 1950 plaintiff was a member of the Communist Party and of other organizations on the "Attorney General's list," and had subscribed to "The People's World"; but that he fundamentally disagreed "with techniques and methods utilized by the Communist Party and by organizations which it controlled."

4/ With respect to plaintiff's claim for damages, the pre-trial order provided: "Pursuant to stipulation of the parties the damage question is reserved until after determination of the constitutional questions of law by the three judge Court and may be heard by a single judge."

5/ An illustration of this fact, occurring in recent weeks, is the explosion of a time bomb in the engine room of a Liberian freighter, the GRAND INTEGRITY, on November 13, 1966, just after the ship had entered into international waters from the Columbia River. The explosion killed two, including the master, and injured seven others.

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

APPENDIX

33 C.F.R. - NAVIGATION AND NAVIGABLE WATERS

Chapter 1 - Coast Guard, Department of the Treasury

Subchapter A - General

PART 6 - PROTECTION AND SECURITY OF VESSELS, HARBORS, AND WATERFRONT FACILITIES

Subpart 6.10 - Identification and Exclusion of Persons From Vessels and Waterfront Facilities.

§ 6.10-1 Issuance of documents and employment of persons aboard vessels.

No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: Provided, That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply. [E.O. 10352, 17 F.R. 4624, May 21, 1952]

§ 6.10-3 Special validation of merchant marine documents.

The Commandant may require that all licensed officers and certificated men who are employed on other than the exempted

designated categories of merchant vessels of the United States be holders of specially validated documents. The form of such documents, the conditions, and the manner of their issuance shall be as prescribed by the Commandant. The Commandant shall revoke and require the surrender of a specially validated document when he is no longer satisfied that the holder is entitled thereto.

§ 6.10-5 Access to vessels and waterfront facilities.

Any person on board any vessel or any person seeking access to any vessel or any waterfront facility within the jurisdiction of the United States may be required to carry identification credentials issued by or otherwise satisfactory to the Commandant. The Commandant may define and designate those categories of vessels and areas of the waterfront wherein such credentials are required.

§ 6.10-7 Identification of credentials.

The identification credential to be issued by the Commandant shall be known as the Coast Guard Port Security Card, and the form of such credential, and the conditions and the manner of its issuance shall be as prescribed by the Commandant after consultation with the Secretary of Labor. The Commandant shall not issue a Coast Guard Port Security Card unless he is satisfied that the character and habits of life of the applicant therefor are such as to authorize the belief that the presence of

such individual on board a vessel or within a waterfront facility would not be inimical to the security of the United States. The Commandant shall revoke and require the surrender of a Coast Guard Port Security Card when he is no longer satisfied that the holder is entitled thereto. The Commandant may recognize for the same purpose such other credentials as he may designate in lieu of the Coast Guard Port Security Card. [E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

§ 6.10-9 Appeals.

Persons who are refused employment or who are refused the issuance of documents or who are required to surrender such documents, under this subpart, shall have the right of appeal, and the Commandant shall appoint Boards for acting on such appeals. Each such Board shall, so far as practicable, be composed of one Coast Guard officer, one member drawn from management, and one member drawn from labor. The members drawn from management and labor shall, upon suitable security clearance, be nominated by the Secretary of Labor. Such members shall be deemed to be employees of the United States and shall be entitled to compensation under the provisions of section 15 of the Act of August 2, 1946 (5 U.S.C. 55a) while performing duties incident to such employment. The Board shall consider each appeal brought before it and, in recommending final action to the Commandant, shall insure the appellant all fairness consistent with the safeguarding of the national security.

APPENDIX

33 C.F.R. - NAVIGATION AND NAVIGABLE WATERS

Chapter 1 - Coast Guard, Department of the Treasury

Subchapter K - Security of Vessels

[CGFR 56-12]

PART 121 - SPECIAL VALIDATION ENDORSEMENT FOR EMERGENCY SERVICE FOR MERCHANT MARINE PERSONNEL

By virtue of the authority vested in me as Commandant, United States Coast Guard, by Executive Order 10173, as amended, Part 121 is amended to read as follows:

Sec.

121.01 Requirement for special validation endorsement.

121.03 Standards.

121.05 Applications.

121.07 Approval of applicant by Commandant.

121.09 Holders of special validation endorsement.

121.11 Notice by Commandant.

121.13 Hearing Boards.

121.15 Notice by Hearing Board.

121.17 Challenges.

121.19 Hearing procedure.

121.21 Action by Commandant.

121.23 Appeals.

121.25 Action by Commandant after appeal.

121.27 Outstanding endorsements and applications.

121.29 Applications previously denied.

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

AUTHORITY: §§ 121.01 to 121.29 issued under Sec. 1, 40 Stat.220, as amended; 50 U.S.C. 191; E.O. 10173, 15 F.R. 7005, 3 CFR, 1950 Supp., E.O. 10277, 16 F.R. 7537, 3 CFR, 1951 Supp., E.O. 10352, 17 F.R. 4607, 3 CFR, 1952 Supp. Interpret or apply: R.S. 4517, as amended, 4518, as amended, secs. 19, 223 Stat. 58, 118 as amended, sec. 7, 49 Stat. 1936, as amended; 46 U.S.C. 570, 571, 572, 2, 689.

§ 121.01 Requirements for special validation endorsement.

(a) Except as otherwise provided in this section no person shall be employed on a merchant vessel of the United States of 100 gross tons or over unless he is in possession of a Merchant Mariner's document bearing a special validation endorsement for emergency service.

(b) The vessels described in paragraph (a) of this section include those at anchor or made fast to a dock, but not those laid up or dismantled or out of commission.

(c) By "employed" and "employment" is meant the engagement of any person to fill any licensed or certificated berth on board ship whether or not under articles and includes those engaged for standby, relief, or other capacities.

(d) The following terms and conditions shall apply with respect to the employment of any person as a replacement or addition in the crew of any vessel described in paragraph (a) of this section at foreign ports when persons in possession of documents bearing a special validation endorsement for emergency service are not available as established to the satisfaction of the United States consular representative of the area:

(1) A person in possession of a United States seaman's

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

document not bearing a special validation endorsement for emergency service may be employed only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(2) A person who is a United States citizen and who is not in possession of a United States seaman's document may be employed if no person specified in subparagraph (1) of this paragraph is available as established to the satisfaction of the United States consular representative for the area, and then only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(3) A person who is not a citizen of the United States and who is not in possession of a United States seaman's document may be employed only if no person as specified in subparagraphs (1) and (2) of this paragraph is available as established to the satisfaction of the United States consular representative for the area and then only after the following terms and conditions are met:

(i) No such person shall be employed unless he presents evidence of temporary clearnace from the United States consular representative for the area;

(ii) In no case shall the number of such persons employed on any one vessel exceed ten (10) percent of the total complement of the vessel, unless it is established to the satisfaction of the United States consular representative for the area that it is necessary to exceed this percentage to avoid delay to the sailing of the vessel or that the employment of persons with

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

special qualifications as additional crew members is necessary in the vessel's operations; and

(iii) No such person shall be employed to fill the berth of a licensed officer or registered staff officer, except that if no radio officer is available as established to the satisfaction of the United States consular representative for the area, a person may be employed as radio operator in accordance with the provisions of Article 24, section 2, of the International Telecommunications Convention (Atlantic City, 1947), which reads as follows:

2. (1) In the case of complete unavailability of the operator in the course of a sea passage, a flight or a journey, the master or the person responsible for the station may authorize, solely as a temporary measure, an operator holding a certificate issued by the government of another country member of the Union [Footnote: The term "Union" means those countries which are parties to the International Telecommunications Convention] to perform the radio communication service.

(2) When it is necessary to employ as a temporary operator a person without a certificate or an operator not holding an adequate certiciate, his performance as such must be limited solely to signals of distress, urgency and safety, messages relating thereto, messages relating directly to the safety of life, urgent messages relating to movement of the ship and essential messages relating to the navigation and safe movement of the aircraft. Persons employed in these cases are bound by the provisions of 508 regarding the secrecy of correspondence.

(3) In all cases, such temporary operators must be

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

replaced as soon as possible by operators holding the certificate prescribed in Sec. 1 of this article.

§ 121.03 Standards. Information concerning an applicant for special validation endorsement for emergency service, or a holder of such endorsement, which may preclude a determination that his character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, shall relate to the following:

(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.

(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

(d) Deliberate unauthorized disclosure of classified defense information.

(e) Membership in, or affiliation or sympathetic association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

§ 121.05 Applications. (a) Any person legally holding a current valid license or certificate, or an applicant for such a document, may make application at any Coast Guard Marine Inspection Office for a special validation endorsement for emergency service.

(b) Each Marine Inspection Office shall forward promptly

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

to the Commandant each application for a special validation endorsement received by it.

(c)(1) Application for special validation endorsement shall be made under oath in writing and shall include applicant's answers in full to inquiries with respect to such matters as are deemed by the Commandant to be pertinent to the standards set forth in § 121.03, and to be necessary for a determination whether the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(2) If an applicant fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquires directed to him.

(d)(1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in § 121.03 and necessary to enable him to make such a determination.

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

(e) Upon receipt, the application and such further information as the Commandant may be required shall be referred, except in those instances where action on an application is held in abeyance pursuant to paragraphs (c)(2) or (d)(2) of this section, to a committee composed of a representative of the Legal Division, of the Merchant Vessel Personnel Division, and of the Intelligence Division, Coast Guard Headquarters. The committee shall prepare an analysis of the available information and shall make recommendations for action by the Commandant.

§ 121.07 Approval of applicant by Commandant. (a) If the Commandant is satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will direct that a special validation endorsement be entered on the applicant's Merchant Mariner Document.

(b) If the Commandant is not satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will notify the applicant in writing as provided for in § 121.11.

§ 121.09 Holders of special validation endorsement. (a) Whenever the Commandant is not satisfied that the character

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

and habits of life of a holder of a document bearing a special validation endorsement are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will request the holder to furnish under oath in writing such information as he deems pertinent to the standards set forth in § 121.03 and necessary for a determination on this issue.

(b) If the holder fails or refuses to furnish such information within thirty (30) days after receipt of the Commandant's request, the Commandant may issue the written notice provided for in § 121.11(a).

(c) The holder's failure or refusal to furnish such information shall preclude a determination that the holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(d) Upon receipt of such information as the Commandant may have required, the procedure prescribed in § 121.05(e) shall be followed.

(e) If the Commandant is satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder accordingly.

(f) If the Commandant is not satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104.
PHONE: (206) 622-8506

shall notify the holder in writing as provided for in § 121.11.

§ 121.11 Notice by Commandant. (a) The notice provided for in §§ 121.07 and 121.09 shall contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer.

(b) The applicant or holder shall have 20 days from the date of receipt of the notice of reasons to file written answer thereto. Such answer may include statements or affidavits by third parties or such other documents or evidence as the applicant or holder deems pertinent to the matters in question.

(c) Upon receipt of such answer the procedure prescribed in § 121.05 (e) shall be followed.

(d) If the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document or, in the case of a holder, notify him accordingly.

(e) If the Commandant is not satisfied that the applicant't or holder's character and habits of life are such as to

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall refer the matter to a Hearing Board for hearing and recommendation in accordance with the provisions of this part.

§ 121.13 Hearing Boards. The Commandant may establish a Hearing Board in each Coast Guard District. The Commandant shall designate for each Hearing Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a second member from a panel of persons representing labor named by the Secretary of Labor, and a third member from a panel of persons representing management named by the Secretary of Labor.

§ 121.15 Notice by Hearing Board. Whenever the Commandant refers a matter to a Hearing Board, the Chairman shall:

(a) Fix the time and place of the hearing;

(b) Inform the applicant or holder of the names of the members of the Hearing Board, their occupations, and the businesses or organizations with which they are affiliated, of his privilege of challenge, and of the time and place of the hearing.

(c) Inform the applicant or holder of his privilege to appear before the Hearing Board in person or by counsel or representative of his choice, and to present testimonial and documentary evidence in his behalf, and to cross-examine any witness appearing before the Board; and

(d) Inform the applicant or holder that if within 10 days after receipt of the notice he does not request an opportunity to appear before the Hearing Board, either in person or

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

by counsel or representative, the Hearing Board will proceed without further notice to him.

§ 121.17 Challenges. Within five days after receipt of the notice described in § 121.15 the applicant or holder may request disqualification of any member of the Hearing Board on the grounds of personal bias or other cause. The request shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. The affidavit may be supplemented by an oral presentation if desired. If after due consideration the Chairman believes a challenged member is qualified notwithstanding the challenge, he shall notify the person who made the challenge and arrange to proceed with the hearing. If the person who made the challenge takes exception to the ruling of the Chairman, the exception and data relating to the claim of disqualification shall be made a matter of record. If the Chairman finds that there is reasonable ground for disqualification he shall furnish the person who made the challenge with the name of an alternate in lieu of the challenged member and arrange to proceed with the hearing. In the event the Chairman is challenged, he shall forthwith notify the Commandant, furnishing the grounds for the claim of disqualification, and the Commandant shall act upon the challenge in accordance with the foregoing procedure. In addition to the right of challenge for cause, a person who has requested a hearing shall have two peremptory challenges, one challenge for the management member and one challenge for the labor member of the Hearing Board. Should the management member be so challenged, the person who made the challenge may elect to have the management member

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

replaced by another management member or by a member not representing either management or labor; if the member peremptorily challenged represents labor, the person who made the challenge may elect to have the labor member replaced by another labor member or by a member not representing either management or labor.

§ 121.19 Hearing procedure. (a) Hearing shall be conducted in an orderly manner and in a serious, business-like atmosphere of dignity and decorum and shall be expedited as much as possible.

(b) The hearing shall be in open or closed session at the option of the applicant or holder.

(c) Testimony before the Hearing Board shall be given under oath or affirmation.

(d) The Chairman of the Hearing Board shall inform the applicant or holder of his right to:

(1) Participate in the hearing;

(2) Be represented by counsel of his choice;

(3) Present witnesses and offer other evidence in his own behalf and in refutation of the reasons set forth in the Notice of the Commandant; and

(4) Cross-examine any witnesses offered in support of such reasons.

(e) Hearings shall be opened by the reading of the Notice of the Commandant and the answer thereto. Any statement and affidavits filed by the applicant or holder may be incorporated in the record by reference.

(f) The Hearing Board may, in its discretion, invite any person to appear at the hearing and testify. However, the Board

shall not be bound by the testimony of such witness by reason of having called him and shall have full right to cross-examine the witness. Every effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

(g) The applicant or holder may introduce such evidence as may be relevant and pertinent. Rules of evidence shall not be binding on the Hearing Board, but reasonable restrictions may be imposed as to the relevancy, competency and materiality of matters considered. If the applicant or holder is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration.

(h) The applicant or holder or his counsel or representative shall have the right to control the sequence of witnesses called by him.

(i) The Hearing Board shall give due consideration to documentary evidence developed by investigation, including membership cards, petitions bearing the applicant's or holder's signature, books, treatises or articles written by the applicant or holder and testimony by the applicant or holder before duly constituted authority.

(j) Complete verbatim stenographic transcription shall be made of the hearing by qualified reporters and the transcript shall constitute a permanent part of the record. Upon request, the applicant or holder or his counsel or representative shall be furnished, without cost, a copy of the transcript of the hearing.

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

(k) The Board shall reach its conclusion and base its determination on information presented at the hearing, togther with such other information as may have been developed through investigations and inquiries or made available by the applicant or holder.

(l) If the applicant or holder fails, without good cause shown to the satisfaction of the chairman, to appear personally or to be represented before the Hearing Board, the Board shall proceed with consideration of the matter.

(m) The recommendation of the Hearing Board shall be in writing and shall be signed by all members of the Board. The Board shall forward to the Commandant, with its recommendation, a memorandum of reasons in support thereof. Should any member be in disagreement with the majority a dissent should be noted setting forth the reasons therefor. The recommendation of the Board, together with the complete record of the case, shall be sent to the Commandant as expeditiously as possible.

§ 121.21 Action by Commandant. (a) If, upon receipt of the Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mainer's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Board's recommendation, the Commandant is not satisfied that the character and habits of

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall:

(1) In the case of an applicant for special validation endorsement, notify him of the Commandant's refusal to enter such endorsement;

(2) In the case of an applicant for a Merchant Mariner's Document, notify him of the Commandant's refusal to issue such document; or

(3) In the case of a holder, revoke and require the surrender of his special validation endorsement.

(c) Such applicant or holder shall be notified of his right, and shall have 20 days from the receipt of such notice within which, to appeal under this part.

§ 121.23 Appeals. (a) The Commandant shall establish at Coast Guard Headquarters, Washington, D.C., an Appeal Board to hear appeals provided for in this part. The Commandant shall designate for the Appeal Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a member from a panel of persons representing management nominated by the Secretary of Labor, and a member from a panel of persons representing labor nominated by the Secretary of Labor. The Commandant shall insure that persons designated as Appeal Board members have suitable security clearance. The Chairman of the Appeal Board shall make all arrangements incident to the business of the Appeal Board.

ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8586

(b) If an applicant or holder appeals to the Appeal Board within 20 days after receipt of notice of his right to appeal under this part, his appeal shall be handled under the same procedure as that specified in § 121.15 and the privilege of challenge may be exercised through the same procedure as that specified in § 121.17.

(c) Appeal Board proceedings shall be conducted in the same manner as that specified in § 121.19.

§ 121.25 Action by Commandant after appeal. (a) If, upon receipt of the Appeal Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Appeal Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall notify the applicant or holder that his appeal is denied.

§ 121.27 Outstanding endorsements and applications.

(a) All special validation endorsements for emergency service entered upon Merchant Mariner's Documents will be accepted as valid until cancelled, revoked, or suspended by proper authority.

(b) A person who has filed an application for a Merchant Mariner's Document bearing a special validation endorsement for

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

emergency service and who has not received such an endorsement prior to May 1, 1956, shall submit a new application in accordance with the requirements of this part.

§ 121.29 Applications previously denied. A person who has been denied a Merchant Mariner's Document bearing a special validation endorsement for emergency service, before May 1, 1956, may file a new application for such an endorsement in accordance with the requirements of this part.

It is hereby found that compliance with the notice of proposed rule making, public rule making procedures thereon, and effective date requirements of the Administrative Procedure Act is contrary to the public interest since this revision of 33 CFR Part 121 is to implement more effectively Executive Order 10173, as amended, and in the public interest should be placed in operation as soon as possible. This amendatory regulation shall become effective May 1, 1956.

50, U.S.C., § 191 (1964)

Regulation of anchorage and movement of vessels during national emergency

Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

Within the territory and waters of the Canal Zone the Governor of the Canal Zone, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened distrubances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations -

(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damange or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506

(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States. Any appropriation available to any of the Executive Departments shall be available to carry out the provisions of this chapter. June 15, 1917, c. 30, Title II, § 1, 40 Stat. 220; Aug. 9, 1950, c. 656, § 1, 64 Stat. 427; Sept. 26, 1950, c. 1049, § 2(b), 64 Stat. 1038.

SCHROETER, TALBOT AND SMITH
ATTORNEYS AT LAW
734 CENTRAL BUILDING, SEATTLE, WASHINGTON 98104
PHONE: (206) 622-8506